



July 25, 2002

The Honorable Ken Jacobsen
Chair, Senate Natural Resources,
Parks & Shorelines Committee
427 John A. Cherberg Building
Olympia, WA 98504-0446

The Honorable Mark Doumit
Chair, House Natural Resources Committee
Washington State House of Representatives
203 John L. O'Brien Building
Olympia, WA 98504

Subject: Progress Report on Forests & Fish Federal Assurances

Dear Senator Jacobsen and Representative Doumit:

As directed in RCW 77.85.190, I've enclosed our first progress report on the Federal Assurances Project for implementing the Forest & Fish Report as required under the provisions of the Forests Practices – Salmon Recovery Bill (ESHB 2091, 1999 1st special session).

Your continued support of Forests & Fish is appreciated. If you have any questions about this project, please don't hesitate to contact me at (360) 902-1603, or Debora Brown Munguia, Federal Assurances Project Manager, at (360) 902-1448.

Sincerely,

Pat McElroy
Executive Director of Regulatory Programs

Enclosure

c: Debora Brown Munguia, Federal Assurances Project Manager

DEPARTMENT OF NATURAL RESOURCES

FORESTS & FISH FEDERAL ASSURANCES Progress Report

July 25, 2002

Current Status

DNR and the FFR stakeholders are now actively engaged in obtaining assurances from the federal agencies under the pertinent sections of the ESA and CWA. The finalization of federal assurances will complete the implementation of the FFR as required under ESHB 2091. As mandated in the legislation passed last session (HB 2570), federal assurances will be obtained by June 30, 2005. The following represent steps the State is taking to help ensure the granting of federal assurances within the timeline provided by the Legislature:

- *Funding*

- Funding has been secured for the first year of the federal assurances project (May 1, 2002 to June 30, 2003). The Salmon Recovery Funding Board has approved \$836,000 to cover the first year of the project, which will include such activities as developing a draft environmental impact statement and a draft application package.
- DNR is currently seeking additional federal funding for the remaining two years of the project. DNR has applied for a grant under Section 6 of the ESA and is assessing other federal funding programs.

- *Staffing*

- DNR is the lead agency for this project. The Federal Assurances Project Manager position was filled on May 1. Three additional project positions were filled on July 1.
- Contracts are currently being negotiated with the Attorney General's Office, Department of Fish and Wildlife, and Department of Ecology for staffing from these agencies for the project.
- The federal agencies have designated staff to assist with this project and have either hired those positions or are in the process of hiring those positions.

- *Official Kick-Off*

A Federal Assurances Workshop was held on June 20-21, 2002, in Tacoma, WA. The workshop was the official kick-off for the project and was helpful in energizing and educating FFR stakeholders and other invited guests as the state begins the formal process of securing federal assurances. Speakers at the conference included leaders from the State Legislature, Tribal representatives, and federal and state agency leaders. Key messages from the workshop included:

FFR Implementation

- FFR is a living document that relies on the good working relationship of the agencies, Tribes, stakeholders, and legislature. Recent issues, such as the concerns raised and

solution sets developed to address the Road Maintenance and Abandonment Plans for small landowners in mixed use watersheds, is an example of how FFR and its stakeholders can address problems, pose solutions, and continue to refine the agreement.

- Small landowner issues continue to be an important focus of FFR stakeholders. Funding and flexibility seem to be two of the key ingredients for ensuring successful FFR implementation for these landowners along with continued development of education and training opportunities
- Cultural Resource issues are an integral part of FFR and work continues to ensure cultural resources are recognized and protected under the provisions of the agreement.
- The Adaptive Management Program is key to gaining federal assurances. Work is currently focusing on how to improve performance of the program including how to organize efficiently and effectively to address monitoring, peer review, and provide feedback to policy makers such as the Forest Practices Board.
- The continued funding of FFR is going to be challenging, and is an important element for obtaining federal assurances.
- The stakeholders involved in developing the FFR want the assurances to capture the agreement as contrasted with re-negotiating the agreement.
- The State will need to complete an EIS under SEPA due to the state action of seeking ESA assurances. However, SEPA rules allow use of a federal EIS if certain procedures are met.

The Services are Ready to Engage

- The Services signaled that they are ready to engage in the assurances process and would prefer the State to choose either a 4(d) pathway or an HCP pathway as opposed to moving forward simultaneously with both. They are worried about having the resources to conduct the procedural and substantive processes required for each pathway simultaneously.
- The Services listed some of the pros and cons of the two pathways and described the key procedural and substantive steps under each pathway.
 - Both pathways will require similar work in terms of NEPA analysis and a biological opinion under Section 7 consultation. Approval of regulations as within NMFS' 4(d) Rule's Limit 13 without NEPA analysis or Section 7 consultation may be highly vulnerable to legal challenges on precisely that basis.

- Only the HCP can provide “no surprises.” Unlike an Incidental Take Permit (ITP), which assures that actions legally authorized by the HCP and the ITP will not be subject to increased conservation measures and costs in the future, a 4(d) Rule limit provides no such guarantee. Under a 4(d) limit there is uncertainty associated with gaining, maintaining, and ensuring coverage for the government entity’s activities.
- Only the HCP can cover both threatened and endangered species. A Section 10 ITP may cover terrestrial and marine threatened, endangered, proposed candidate, and at-risk species under USFWS and NMFS jurisdictions.
- The NMFS 4(d) Rule only applies to threatened salmonid species within specified Evolutionary Significant Units (ESUs). It does not apply to endangered species, and provides no assurance with respect to Bull Trout, which is subject to USFWS regulation. USFWS could promulgate a 4(d) rule, but this would take time to file in the Federal Register and go through other procedural approval processes not yet underway.
- The FFR, which serves as the best codified standard for assisting in the NMFS FFR 4(d) limit approval process, has been and is likely to be further challenged, thereby creating a level of uncertainty about the expeditiousness and cost-effectiveness of the 4(d) pathway.
- NMFS and USFWS are familiar with the HCP process, and HCPs are subject to well-defined, rigorous standards. An HCP could ultimately prove to be a more expeditious and less costly alternative than the 4(d) limit given the uncertainty and lack of precedent surrounding 4(d) limits.
- The Services assume that the State will fund a federal Environmental Impact Statement of whatever form of ESA assurances it seeks. The Services are supportive of incorporating appropriate information from the already completed SEPA EIS conducted by the Forest Practices Board for FFR-based rules.

Clean Water Act Assurances

- Both EPA and Ecology view FFR as a science-based program that provides steady improvement in water quality conditions in forested watersheds with the goal of attaining water quality standards.
- Both EPA and Ecology listed various mechanisms where FFR is assisting in implementing the CWA on non-federal forestland:
 - 319 Report – FFR is a key program for addressing non-point sources of pollution, particularly on non-federal forestland;
 - Implementation planning for completed TMDLs in forested watersheds; and

- FFR will be considered in the development and approval of TMDL prioritization.
- CWA implementation will continue to experience change due to ongoing revisions in water quality standards, national and regional guidance, and related rulemaking in CWA programs. FFR stakeholders should continue to be actively engaged in these processes.

Current Activity

The Federal Assurances project team is currently developing a detailed work plan for the project. This advance project planning is designed to help ensure success by building a strong team, identifying and addressing issues, developing a clear roadmap to implementation, and maintaining/improving internal and external communication. The project plan will include key outcomes necessary to achieve the purpose and goal of gaining federal ESA and CWA assurances. Each key outcome will be linked to the schedule and specific activities.

Summary

The basic framework for the vision of FFR is in place. We are now focusing on the federal approval processes. That process will require action, support, funding, and continued collaboration.

Through the Timber, Fish and Wildlife process and our regulations under the Forest Practices Act, Washington State is leading the nation with state-based rules governing forest practices activities that sustain a viable timber industry while meeting the requirements of the nation's premier federal environmental laws. This cooperative partnership between federal and state agencies is what was envisioned by both the Clean Water Act and the Endangered Species Act when Congress enacted those laws 30 years ago.

Our state is in the singular position to help make state and federal laws work together to achieve public resource protection while maintaining economic viability.